

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JOSEPHINE LINKER HART, JUDGE

DIVISION III

JAMES LEE ROLFE

CA06-184

APPELLANT

April 11, 2007

V.

WILLIAM BLANKENSHIP, JR. and
PRINSBURG STATE BANK

APPEAL FROM THE JEFFERSON
COUNTY CIRCUIT COURT
[NO. CV-2004-229-2]

APPELLEES

HON. JODI RAINES DENNIS,
CIRCUIT JUDGE

AFFIRMED

James Lee Rolfe appeals from a judgment entered by the Jefferson County Circuit Court bench trial that established the existence of a prescriptive easement on the southernmost thirty feet of Rolfe's property. On appeal, Rolfe argues that the trial court erred in denying his request for a jury trial in this matter and in finding that Prinsburg State Bank had proven its entitlement to a prescriptive easement or, if in the alternative an easement had been acquired, the easement had not been lost by abandonment. We affirm.

William Blankenship, Jr., owns several parcels of agricultural land that adjoin thirty-five acres of land owned and farmed by Rolfe. Blankenship's holdings include a fifteen-acre plot due west of Rolfe, an irregularly-shaped ten acres lying to the east of Rolfe, and a thirty-three-acre parcel that borders Rolfe's land on the southeast corner. Prinsburg State Bank is the successor in title to thirty-eight acres owned by Jerry Haynes until October 25, 2001. Those thirty-eight acres lie south and southwest of Blankenship's fifteen-acre parcel. Haynes

also held additional agricultural land east of the Rolfe property. It is undisputed that Blankenship and Haynes, and their predecessors in title, crossed over land owned by Rolfe to transport equipment and farming supplies between their various holdings. This occasional use of the southernmost thirty feet of the Rolfe property began at least as early as the 1970's and predated Rolfe's ownership of his property.

Rolfe eventually became intolerant of Blankenship and Haynes crossing his property. On March 26, 2004, Blankenship and Prinsburg State Bank filed a complaint seeking to establish an easement along the southernmost thirty feet of Rolfe's property and "to restrain and enjoin [Rolfe] from interfering with [their] right to use the easement." The case was originally set for trial on December 10, 2004, but was not tried until July 21, 2005, and August 19, 2005. In deciding in favor of Blankenship and Prinsburg State Bank, the trial judge made an express finding that Rolfe's testimony concerning the dates of use of the easement was not credible.

Rolfe first argues that the trial court erred in denying his request for a jury trial. He acknowledges the dual bases stated by the trial court for denying his motion, *i.e.*, the motion was untimely made and the cause was not triable by a jury, but nonetheless contends that the denial was error. He concedes that Arkansas Rule of Civil Procedure 38 requires twenty-days' notice for requesting a jury trial and that he made his request just eight days before trial. He asserts, however, that the twenty-day requirement was "simply a housekeeping rule" to permit sufficient time for a jury to be called, and the eventual postponement of the original trial setting created a situation where there was no prejudice to the opposing parties and no

inconvenience to the trial court. Further, citing *King v. Powell*, 85 Ark. App. 212, 148 S.W.3d 792 (2004), Rolfe argues that a jury trial in this matter was proper. We disagree.

We review a trial court's decision denying a request for a jury trial for abuse of discretion. *Duncan v. McGaugh*, 19 Ark. App. 276, 719 S.W.2d 710 (1986). A litigant must demand a jury trial not later than twenty days before trial. Ark. R. Civ. P. 38(a). Failure of a party to demand a jury trial as required by the rule constitutes a waiver. Ark. R. Civ. P. 38(c).

We believe that the instant case is analogous to *McGaugh*, where this court upheld a trial judge's denial of an untimely demand for a jury trial despite the fact that, as in the instant case, the trial was later continued. The instant case differs from *McGaugh* only in the amount of time that elapsed between when the case was originally scheduled for and when it was actually tried. We do not believe that this distinction is significant.

Moreover, we do not believe that the posture of this case would allow a jury trial. In their complaint, Blankenship and Prinsburg State Bank sought injunctive relief in addition to a declaration of the existence of a prescriptive easement. In *First National Bank of DeWitt v. Cruthis*, 360 Ark. 528, 203 S.W.3d 88 (2005), the supreme court stated that Art. 2, Sec. 7 does not assure the right to a jury trial in all possible instances, but rather in those cases where the right to a jury trial existed "when our constitution was framed." Injunctive relief is exclusively a remedy available at equity. *Manitowoc Remanufacturing, Inc. v. Vocque*, 307 Ark. 271, 819 S.W.2d 275 (1991). It is axiomatic that a jury trial is not available in courts of equity.

We are mindful of Rolfe's citation of *King v. Powell*, *supra*; however, we do not believe that case compels a different result. In *King*, the appellant counterclaimed for the declaration of a prescriptive easement. Unlike in the instant case, there was no prayer for injunctive relief. Accordingly, we interpret the relief sought in *King* to be essentially a declaratory judgment, which is cognizable at both law and equity. See Ark. Code Ann. § 16-111-107 (Repl. 2006).

Rolfe next challenges the trial court's finding that Prinsburg State Bank established its entitlement to a prescriptive easement. He argues that a prescriptive easement may be deemed abandoned where the owner of the easement "does, or permits to be done, any act inconsistent with its future enjoyment." Rolfe notes that both he and Haynes testified about his discing the easement and planting crops on it. He asserts that was an act "completely inconsistent with any use of the easement by Haynes," and "Haynes did nothing." Further he asserts that Haynes testified that, at his insistence, he ceased using the turn row after the spring of 1997, and because this case was filed in March of 2004, the seven-year statute of limitations had run. Rolfe concedes that there was "disputed testimony" concerning Blankenship's use of the easement, but states that Blankenship did not establish a prescriptive easement for Prinsburg. We do not find this argument persuasive.

This court reviews equity cases de novo on the record, but we do not reverse unless we determine that the trial court's findings of fact were clearly erroneous. *Holaday v. Fraker*, 323 Ark. 522, 920 S.W.2d 4 (1996). In reviewing a trial court's findings of fact, we give due deference to the trial judge's superior position to determine the credibility of witnesses and

the weight to be accorded to their testimony. *Id.* Clear error exists when, although there is evidence to support the decision under review, the reviewing court is left with a definite and firm conviction that mistake has been committed. *Neal v. Matthews*, 342 Ark. 566, 30 S.W.3d 92 (2000).

We note first that Rolfe’s argument does not actually challenge Blankenship’s entitlement to a prescriptive easement, and we deem any argument as to Blankenship’s rights to be abandoned on appeal. As to Prinsburg State Bank, we agree with Rolfe that the establishment of the easement depends on the actions of its predecessor in title. However, we disagree with his characterization of the relevant evidence.

On direct examination, Haynes testified that he used the easement “pretty much every day,” from “1986 to 1998.” Haynes stated that his last year of farming was 1998. On cross-examination, he expressed some uncertainty as to the exact dates, but recalled that he used the easement in the spring or “early summer” of 1997, but also that he used the easement as long as he owned agricultural property in the area. A deed that was entered into evidence shows that Haynes conveyed his land to Prinsburg State Bank on August 7, 2001. As we noted previously, the trial judge made an express finding that Haynes’s testimony regarding the dates of use was credible and Rolfe’s testimony on that subject was not. Accordingly, even if we were to assume that the trial court’s finding that Haynes “farmed fish on the Prinsburg Property from approximately 1991 until approximately 1999,” was error—and Rolfe does not specifically challenge these findings in his argument—our de novo review of the record would nonetheless compel us to conclude Haynes’s last use of the easement was no earlier than the

late spring or early summer of 1997. Consequently, Haynes did not “abandon” the easement seven years prior to the March 26, 2004, filing of the complaint to establish a prescriptive easement. We therefore hold that there was no reversible error.

Affirmed.

BAKER and GRIFFEN, JJ., agree.